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February 22, 2000

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Office of the Secretary
Federal Communications Commission
Room TW-B-204
445 Twelfth Street, S.W.
Washington, D.C. 20554

RECEIVED
FEB 22 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (d/b/a Southwestern Bell Long Distance) for Authority to Provide In-Region InterLATA Services in Texas, CC Docket No. 00-4

Dear Ms. Salas:

Pursuant to the Communication's Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice Nos. FCC 96-469, 97-330, and DA 98-1354, we are enclosing the following:

- One original and one copy of a redacted Reply (in paper form). The Reply consists of two parts: (1) a Reply Brief in support of the Application; and (2) other supporting documentation.
- One copy of the Reply Brief (without attachments) and supporting affidavits (without attachments) on diskette.
- Five additional copies of the redacted Reply (in paper form), so that each Commissioner may have a copy.

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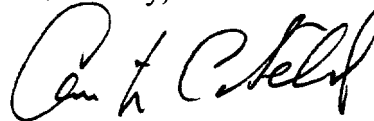
- One original of only the portions of the Reply that contain confidential information (in paper form). A copy of this letter will also accompany that version of the Reply. Some of the material we are submitting includes confidential information relating to Southwestern Bell's wholesale and resale operations in Texas, as well as other information containing trade secrets. As such, we are requesting that these portions of the Reply receive confidential treatment under the existing protective order in this proceeding.

Please date-stamp the extra copy of this letter and return it to the individual delivering this package.

We are also submitting under separate cover copies (redacted as appropriate) of the Reply to Janice Myles, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, Room 5-C-327, 455 12th Street, S.W., Washington, D.C. 20554. Copies are also being submitted to the Department of Justice, to the Texas Public Service Commission, and to ITS (the Commission's copy contractor).

If you have any questions, please call me at 202-326-7907.

Sincerely,

A handwritten signature in black ink, appearing to read "Austin Schlick", written in a cursive style.

Austin Schlick

Enclosures

cc: Ms. Janice Myles
Ms. Jamie Heisler, DOJ
ITS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Application by SBC Communications Inc.,
Southwestern Bell Telephone Company, and
Southwestern Bell Communications Services,
Inc. d/b/a Southwestern Bell Long Distance
for Provision of In-Region, InterLATA
Services in Texas

CC Docket No. 00-4

To: The Commission

**REPLY BRIEF IN SUPPORT OF APPLICATION BY SOUTHWESTERN BELL
FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN TEXAS**

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February 22, 2000

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
DISCUSSION	9
I. LOCAL COMPETITION IN TEXAS IS UBIQUITOUS, EXTENSIVE, AND IRREVERSIBLE.....	9
II. SOUTHWESTERN BELL PROVIDES ACCESS TO xDSL- CAPABLE LOOPS AND HOT CUTS.....	12
A. Southwestern Bell Satisfies Both of the Commission's Alternative Tests for Demonstrating Nondiscriminatory Access to xDSL-Capable Loops	13
1. DOJ's Attack on SWBT's Performance Data Does Not Undermine Southwestern Bell's Proof	19
2. Additional CLEC Allegations of Discrimination Are Likewise Unfounded.....	26
3. Southwestern Bell Has Additionally Satisfied the Checklist Requirements for xDSL-Capable Loops by Establishing an Operational Separate Advanced Services Affiliate	34
B. SWBT Satisfies the Hot-Cut Performance Standards of this Commission and the Texas PUC	38
III. SOUTHWESTERN BELL SATISFIES OTHER CHECKLIST REQUIREMENTS.....	42
A. Interconnection	43
B. UNE Platform Order Processing.....	52
C. Pricing of Network Elements.....	55
D. Nondiscriminatory Access to OSS.....	58
1. Telcordia's Test of SWBT's OSS.....	60
2. Change Management Process	63
3. Pre-Ordering: Parsed Address Information	66
4. Ordering: Flow Through and Rejections	66

5.	Double Billing.....	68
E.	Miscellaneous Checklist Issues.....	69
IV.	SOUTHWESTERN BELL HAS SHOWN THAT IT WILL COMPLY WITH THE REQUIREMENTS OF SECTION 272.....	70
A.	Southwestern Bell Provides Full Public Disclosure of the Terms and Conditions of All Transactions Between SWBT and SBCS.....	71
B.	AT&T's Arguments Concerning SWBT's Proposed Intrastate Switched Access Tariffs Are Moot.....	74
V.	APPROVAL OF THE APPLICATION WOULD BE CONSISTENT WITH THE PUBLIC INTEREST.....	74
A.	SWBT Has Not Engaged In Misconduct.....	75
B.	The Performance Remedy Plan Approved by the Texas Commission Will Prevent Any "Backsliding" by SWBT.....	81
	CONCLUSION.....	88
	ATTACHMENT 1 (Southwestern Bell's Response to the Department of Justice Evaluation)	

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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To: The Commission

**REPLY BRIEF OF SOUTHWESTERN BELL
IN SUPPORT OF INTERLATA RELIEF IN TEXAS**

The record in this proceeding is enormous. It includes more than 110,000 pages of materials generated in extensive hearings before the Public Utility Commission of Texas. These materials describe in detail Southwestern Bell's compliance with the 14-point checklist and other requirements of section 271; they track Southwestern Bell's interconnection agreements with 237 different CLECs in Texas; and they monitor Southwestern Bell's performance with respect to approximately 1,900 measures and submeasures, applied on a monthly basis to each of those CLECs. The record also includes detailed information concerning the state of competition in every local telecommunications market in Texas.

The sheer bulk of this material could easily be overwhelming. But this proceeding does not involve a matter of first impression. Southwestern Bell's Application comes to this Commission only after comprehensive screening, sifting, and analysis by the Texas PUC. The Texas Commission has played precisely the role anticipated by the FCC when it urged state commissions "to develop a comprehensive factual record concerning the applicant's compliance

with the requirements of section 271 and the status of local competition.”¹ In the Bell Atlantic New York proceeding, the Commission set out specific criteria for judging state commission evaluations of section 271 applications, and afforded substantial weight to the New York Public Service Commission’s findings under those guidelines. To warrant deference, the Commission stated, a state commission’s review should include: “(1) full and open participation by all interested parties; (2) extensive independent third party testing of [the BOC’s] operations support systems (OSS) offering; (3) development of clearly defined performance measures and standards; and (4) adoption of performance assurance measures that create a strong financial incentive for post-entry compliance with the section 271 checklist.”²

The Texas Commission has satisfied – indeed, exceeded – all of these standards. In its Mega-Arbitration during 1996 and 1997, and then in section 271 proceedings that lasted the next two years, the Texas PUC addressed every issue relating to local competition in Texas that any CLEC saw fit to present. See Southwestern Bell Br. at 3-6. Together with related dockets, the Texas record includes independent testing of Southwestern Bell’s operations systems support (“OSS”), see id. at 27-31; development of comprehensive performance measures, some of which this Commission subsequently relied upon in its SBC/Ameritech merger conditions, see id. at 12-22; a performance remedy package that, Southwestern Bell believes, is more thorough and

¹ Memorandum Opinion and Order, Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, 13 FCC Rcd 539, 554, ¶ 29 (1997).

² Memorandum Opinion and Order, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404, ¶ 8 (rel. Dec. 22, 1999) (“New York Order”).

rigorous than any other such plan anywhere in the country, see id. at 20-22; and point-by-point resolution of hundreds of concerns voiced by CLECs and the Texas Commission and its staff.

None of the commenters in this proceeding has criticized the processes employed by the Texas Commission or suggested that the Texas PUC did anything but bend over backwards to ensure that local markets are fully open to CLECs. The Department of Justice (“DOJ”) has itself recognized that “the Texas PUC and its staff worked carefully and extensively to define the terms, conditions, and operational details necessary for the development of competition in the State of Texas” and to test Southwestern Bell’s compliance with those conditions. DOJ Evaluation at 3.

As a result of these efforts by the Texas PUC, there is no genuine dispute as to most of the issues before this Commission. It is clear that local competition in Texas amply satisfies the requirements of section 271(a)(1). No one seriously disputes that Southwestern Bell has complied with most of the checklist items, or makes more than a half-hearted effort to debate Southwestern Bell's satisfaction of section 272. Every month, Southwestern Bell consistently meets or exceeds the Texas PUC’s performance standards for the overwhelming majority (about 90 percent) of the 1,900 performance measures and submeasures. And no one credibly contests that Texas consumers would benefit enormously from the increased competition in long distance that Southwestern Bell’s entry would bring.

There are really only two major issues left in dispute. This in itself is remarkable. Out of literally thousands of pages of rules, state requirements, and FCC decisions – established through four years of controversy and decisionmaking – the commenters have identified only two grounds that allegedly justify denying SBC’s 271 Application. These two issues are the provisioning of xDSL-capable loops and so-called “hot cuts” – (i.e., the coordinated transfer of

loops from the incumbent LEC to a CLEC). Those are the issues that have attracted the most attention, including from DOJ.³ But the allegations being made are unjustified.

DSL is an issue that did not emerge until last year. As a result, in the New York section 271 proceeding, that state's PSC had not established performance measures for DSL, and Bell Atlantic had undergone no independent testing of its processes for provisioning xDSL-capable loops at the time it was granted 271 relief. Instead, Bell Atlantic agreed, at the 11th hour, to provide its own DSL service through a separate affiliate modeled after the affiliate that SBC had already established. The FCC applauded Bell Atlantic's commitment to follow SBC's lead, and said that in the future either performance data showing nondiscrimination with respect to xDSL loops, or a separate affiliate and a showing of nondiscrimination as to loops generally, would be sufficient to allay the Commission's concerns.

Southwestern Bell has met both of the FCC's two options for demonstrating nondiscriminatory access to DSL-capable loops. Although Bell Atlantic's showing for relief was itself sufficient, Southwestern Bell, unlike Bell Atlantic, has implemented, not just promised, a fully operational separate affiliate for the provision of all advanced services. The affiliate, SBC Advanced Solutions Inc. ("ASI"), began providing advanced services in Texas on February 2, and will be using the same ordering and provisioning systems and procedures as CLECs use, as of February 28. ASI is operating in accordance with structural separation rules that were

³ Commenters, including DOJ, have raised a scattershot of additional issues, but DOJ does not suggest that these other issues are themselves sufficiently serious to warrant denial of SWBT's Application. See DOJ Evaluation at 3 (recommending that the Commission "defer judgment" on issues other than provisioning of xDSL-capable loops and hot cuts). We respond to all these allegations in detail in the body of this Reply Brief and in Southwestern Bell's Response to the Department of Justice Evaluation ("Response to DOJ"), which addresses DOJ's Evaluation point-by-point.

approved by this Commission in both the SBC/Ameritech Merger Order⁴ and the New York Order – and has voluntarily accelerated this Commission’s roll-out schedule in Texas.

Southwestern Bell has also satisfied the second option. Southwestern Bell has provided performance reports showing that Southwestern Bell’s performance in providing DSL-capable loops to CLECs in Texas is at parity or the Texas PUC’s benchmark level for four of the five measurement categories identified in the New York Order (i.e., quality of xDSL-capable loops, timeliness of maintenance and repair, quality of maintenance and repair, and access to OSS functions including loop information). See New York Order ¶ 335. In the fifth relevant performance category, installation intervals, there is a performance difference, but it is largely attributable to the inherent (and temporary) provisioning difference between Southwestern Bell’s retail line sharing for voice and data services, as opposed to CLECs’ use of stand-alone, unbundled loops. The performance difference, moreover, is not large enough to prevent an efficient CLEC from competing. To the contrary, data CLECs are growing in Texas at an incredible rate of 50 percent or more per month.

As for hot cuts, the second major issue in dispute, Southwestern Bell offers CLECs two different processes. If dissatisfied with one, the CLEC can use the other. Performance data, however, show timely and reliable hot-cut performance for both methods. In December 1999, better than 95 percent of all loop cut-overs were completed within the Texas PUC’s 2-hour interval for both processes when CLEC-caused misses are excluded. Even including CLEC-caused misses, Southwestern Bell still met the 2-hour benchmark 93 to 95 percent of the time.

⁴ Memorandum Opinion and Order, Application of Ameritech Corp. and SBC Communications, Inc., for Consent to Transfer Control, 14 FCC Rcd 14712 (1999) (“SBC/Ameritech Merger Order”).

This on-time performance is significantly better than Bell Atlantic reported in New York. Trouble report rates and service outages are approximately the same as in the successful New York application, and certainly allow CLECs to compete effectively.

As recently as December 1999, the Texas PUC held special proceedings to consider concerns raised with respect to xDSL-capable loops and hot cuts, and concluded that Southwestern Bell is in compliance with all requirements for section 271 relief. The Texas PUC reached its conclusions in these and other areas based on a thorough empirical investigation reflecting the entire picture of Southwestern Bell's performance and CLECs' actual opportunities for entry. DOJ, by contrast, has based its contrary recommendation on a handful of performance measures and a miscellany of CLEC anecdotes or carrier-specific snap-shots that, if susceptible to verification at all, prove to be misstated, misleading, or irrelevant.

The simple truth is that DOJ has rejected the analytic approach of this Commission's New York Order, which considered the totality of Bell Atlantic's performance and the actual competitive impact of that performance, rather than the mere existence of allegations of problems. DOJ also rejects specific holdings of the New York Order, such as this Commission's conclusion that a structurally separate advanced services affiliate would provide assurance of nondiscrimination against data CLECs. But, even while departing from this Commission's approach, DOJ has not attempted the sort of hands-on, factual investigation completed by the Texas PUC between 1996 and 1999. DOJ thus provides neither a useful assessment of Southwestern Bell's compliance with the New York Order, nor an informed second opinion on the Texas Commission's finding that local markets in Texas are "irreversibly open." Texas PUC Evaluation at 1.

Under these circumstances, it is the Texas PUC that deserves deference. As this Commission noted in its New York Order (§ 51), “[a]lthough we are statutorily required to accord substantial weight to the DOJ’s evaluation, in appropriate circumstances, we may conclude that the evidence submitted by a state commission is more persuasive than that submitted by the DOJ, particularly if the state has conducted a rigorous analysis of the evidence.” That is precisely the case here.

Like the Texas PUC, we do not claim that Southwestern Bell’s performance has been perfect. But, even where individual performance measures have fallen short for a period of time, one must put that in the context of the overwhelming majority of performance measures that Southwestern Bell has met or exceeded (thereby giving CLECs an advantage over SBC in the marketplace). More importantly, one must recognize that performance measures are not an end in themselves. They are a means to ensuring that local markets in Texas are fully open to competitors. On this critical point, the empirical evidence is unequivocal.

The Texas PUC found that CLECs serve approximately 1 million local lines in Southwestern Bell’s Texas service areas – about 9 percent of all lines. Although Southwestern Bell believes the actual number is significantly higher, it is still above the corresponding percentage Bell Atlantic itself claimed in New York. In the profitable business segment of the local market, CLECs currently serve approximately 22 percent of all business lines in Southwestern Bell’s Texas service areas, generally by using their own network facilities, and have, since April 1998, captured more than four of every five new business lines in Texas. CLECs are rapidly deploying their xDSL services as well, increasing the number of Southwestern Bell unbundled loops they use for these services by 50 percent or more each month.

Not only are these markets open today, but the Texas PUC has specifically identified the tools it intends to use to ensure that the markets remain open. These include review of Southwestern Bell's performance measures and performance results, with a "watch list" of potential emerging problems; an open docket to resolve disputes that arise between Southwestern Bell and CLECs; existing industry forums that are devoted to change management and trunking issues; an industry working group in Texas that is addressing xDSL issues; and a CLEC users' group that provides a broad-based platform for developing and pressing CLEC concerns. Texas PUC Dec. 16, 1999 Open Meeting Tr. at 60-65 (App. C-1, Tab 212). Beyond this, the Chairman of the Texas Commission has stressed that the Texas PUC would not hesitate to work with regulators in other states and with this Commission to take appropriate steps across jurisdictional lines if it became concerned about backsliding by Southwestern Bell. Id. at 66. Such pledges of active and forceful state commission oversight, backed by the Texas PUC's record of leadership in implementing the 1996 Act and reviewing Southwestern Bell's section 271 Application, warrant great respect from this Commission, just as they will receive great respect from Southwestern Bell.

Finally, one must not lose sight of the substantial potential benefits of Southwestern Bell's entry into the concentrated long distance market, particularly for lower-volume residential callers, whom Southwestern Bell has pledged to serve without any flat-rate monthly charges or minimum usage requirements.⁵ These benefits have already been proven in Connecticut, where price competition has substantially lowered rates. Economists calculate that the average Texas

⁵ The flip-side to increased competition in long distance markets is an increased incentive for the major long distance companies to enter local markets so as to offer one-stop shopping to

consumer will benefit by about \$38 per year if Southwestern Bell offers in Texas the interLATA rates it has proposed elsewhere. Based on conservative assumptions, immediate interLATA entry by Southwestern Bell in Texas would result in the creation of 60,000 additional jobs and an increase of \$7.6 billion in the Texas gross state product by the year 2007. Approval of this Application will benefit Texas and Texans, not just Southwestern Bell, by finally realizing the full promise of the 1996 Act. See Southwestern Bell Br. at 47-62.

The Texas Commission has confidently concluded that “SWBT has taken the statutorily required steps to open its local exchange and exchange access markets in Texas to competition,” Texas PUC Evaluation at 1, and that “SWBT’s performance measures and accompanying performance remedy plan are sufficient to hold SWBT to continued compliant performance,” id. at 111. The Texas PUC has earned the right to make that statement, just as “SWBT has earned the right to enter the long distance market” in Texas. Id. at 1.

DISCUSSION

I. LOCAL COMPETITION IN TEXAS IS UBIQUITOUS, EXTENSIVE, AND IRREVERSIBLE

Congress established a specific test of whether local competition in a state is sufficient to support a BOC’s section 271 application. That test is set out in the language of so-called Track A, 47 U.S.C. § 271(c)(1)(A). Southwestern Bell’s satisfaction of Track A is detailed in Southwestern Bell’s Brief (at pages 9-11), and is undisputed. No party, including the CLECs cited as Track A carriers by Southwestern Bell, challenges Southwestern Bell’s satisfaction of this statutory prerequisite.

consumers. That is precisely what has happened in New York after Bell Atlantic’s successful section 271 application there.

The Texas PUC, moreover, confirms that

ETS, OpTel, Birch Telecom, Inc., CoServ, KMC, Sage Telecom, Inc., Allegiance Telecom of Texas, Inc., Intermedia Communications, Inc., MCI-Worldcom, Nextlink, Taylor, Time Warner Telecom, Golden Harbor, e.spire, GST, Teligent and Winstar are currently receiving access and interconnection to SWBT's network facilities pursuant to their respective interconnection agreements and satisfy Track A requirements for SWBT.

Texas PUC Evaluation at 95. Thus, the state commission agrees that Southwestern Bell meets the statutory requirement at least 17 different ways.

This unanimity establishes Southwestern Bell's statutory compliance. See New York Order ¶ 62. But satisfaction of Track A is just the beginning of the story. The Affidavit of John Habeeb details the scope and variety of CLECs' entry in Texas. By Southwestern Bell's best estimate, competitors in Texas have won approximately 12 percent of all business and residential lines in SWBT's Texas service areas. See Habeeb Aff. Table 2 & Attach. E (App. A, Part A-1, Tab 1). CLECs win the overwhelming majority of new business lines and their total share of the business market is 26 to 30 percent in Austin, Dallas/Ft. Worth, Corpus Christi, Houston, and San Antonio. Id. ¶¶ 6, 38. CLECs serve well over half of their customers' lines on a facilities basis. Id. Tables 1, 2. More than 125,000 of these facilities-based lines have been provisioned as pre-combined loop/switch port combinations, i.e., "UNE Platforms." Id. Attach. E. CLECs have won customers in 299 of SWBT's 300 local calling areas. Id. ¶¶ 6, 35.

A handful of CLECs attempt to dismiss this evidence, claiming there is only "paltry penetration by new entrants." Allegiance Comments at 12. Although some of the CLECs have hired outside experts to dress up their arguments, all rely on the same source of supposedly supporting evidence: CLEC responses to Texas PUC data requests. See AT&T's Kelley & Turner Decl. ¶¶ 13, 31; MCI WorldCom's Beard & Mayo Decl. ¶¶ 40-41; Sprint Comments at 74. Unlike the CLECs that use this data, the Texas PUC – which gathered it – is candid about its

limitations. As the Texas PUC explains, less than one-third of the CLECs submitted reports: “SWBT’s totals represent aggregated numbers for 114 CLECs while the Texas Commission’s responses represent aggregated numbers for 31 CLECs.” Texas PUC Evaluation at 102.

Moreover, the Texas PUC data were for the months leading up to September 1999, whereas Mr. Habeeb’s Affidavit provided aggregated data through November 1999. See id.; Habeeb Aff. Attach. E.

The Texas PUC notes the inherent reliability of Southwestern Bell’s estimates of resold lines – that is, lines provided by SWBT itself. In fact, the Texas Commission has determined that Southwestern Bell’s estimate of 318,000 resold lines in October 1999 is “very accurate” and “more reliable” than CLECs’ estimates of resold lines. Texas PUC Evaluation at 102. With respect to facilities-based lines, the Texas PUC has found Southwestern Bell’s methodology for estimating lines “reasonable,” but was unable conclusively to resolve CLEC claims of lower numbers. Id. at 102-03.⁶ Rather, the Texas Commission found that CLECs’ estimates and Southwestern Bell’s estimates establish a range for the total number of facilities-based CLEC lines in SWBT territory, which was 700,000 to 1,300,000 lines as of October 1999. Id. at 103. This undermines AT&T’s claim that “[t]here is very little facilities-based competition in Texas.” AT&T’s Kelley & Turner Decl. ¶ 12.

⁶ SWBT’s methodology, and CLEC criticisms of it, are discussed in the Reply Affidavit of John Habeeb. Mr. Habeeb notes that some CLEC criticisms, such as MCI WorldCom’s claim that SWBT has based its estimates on facilities that are ordered but not yet installed (MCI WorldCom Comments at 60), are false, and others are grossly overstated. Most significant, however, is the fact that, of the 18 Texas CLECs participating in this proceeding, only two – Allegiance and ICG – dispute Southwestern Bell’s estimates of their service. See Allegiance Comments at 13 & Howland Decl.; ICG’s Rowling Aff. ¶ 51 (attached to CLEC Coalition Comments). Surely carriers such as AT&T and MCI WorldCom would have brought forth direct evidence to support their claims of inflated numbers, if they had any.

CLECs acknowledge the “credibility” and “reliable methods” of the Texas Commission in this area. Sprint Comments at 74. Taken together with the Texas PUC’s confirmation of Southwestern Bell’s resale figures, the Texas PUC’s estimate of resold lines establishes a conservative, minimum CLEC line count of more than 1 million lines. See Texas PUC Evaluation at 1 (“The fact that approximately one million Texas local phone lines in SWBT’s historic service area are today served by CLECs is testimony to the fact that SWBT’s market is irreversibly open to competition.”). By way of comparison, Bell Atlantic claimed in its section 271 application that CLECs served 1.1 million lines in New York,⁷ where Bell Atlantic serves about 20 percent more access lines than SWBT serves in Texas.⁸ Thus, based on Bell Atlantic’s own estimates at the time of its application, CLECs have had greater competitive success in Texas than in New York. Since the Commission concluded that “barriers to competitive entry in the local market ha[d] been removed” in New York, and “the local exchange market” in New York was “open to competition,” the same must be true in Texas. New York Order ¶ 426. Regardless of their rhetoric to the contrary, CLECs have shown this by winning customers in the marketplace.

II. SOUTHWESTERN BELL PROVIDES NONDISCRIMINATORY ACCESS TO xDSL-CAPABLE LOOPS AND HOT CUTS

The Texas PUC conducted three years of proceedings to ensure Southwestern Bell’s comprehensive satisfaction of the 14-point competitive checklist, in all its permutations. At the end of those arbitrations, investigations, collaborative sessions, carrier-to-carrier tests, data

⁷ Bell Atlantic’s Taylor Decl. Attach. A ¶ 1, New York Application, App. A, CC Docket No. 99-295 (FCC filed Sept. 29, 1999).

⁸ See FCC, 1998 Preliminary Statistics of Communications Common Carriers, Table 2.9.